TO THE

SUPREME COURT OF THE UNITED STATES

NO. 77-1453

JACK BIRGE,

PETITIONER

vs.

STATE OF GEORGIA,

RESPONDENT

APPLICATION FOR WRIT OF CERTIORARI

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SUMMERVILLE, GEORGIA 30747

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JURISDICTIONAL STATEMENT

OPINIONS BELOW:

The opinion of the Supreme Court of Georgia, State v. Birge (Jan. 3 1978; re-hearing denied Jan. 18 1978) No. 32740, which reversed the decision of the Court of Appeals, and that of the Court of Appeals, Birge v. State (No. 53578, decided June 28 1977)- 142 Ga. App. 735 (236 S.E.2d 906) are reproduced in the appendix.

JURISDICTION:

The jurisdiction of this court is invoked under Section 1257(3), Title 28, United States Code.

QUESTION PRESENTED:

Are States (here, Georgia) bound by Federal decisions (e.g., U. S. v. White, 501 U.S. 745, 91 S.Ct. 1122, 28 L.Ed. 453; Hoffa v. U. S., 385 U.S. 293, 87 S.Ct. 1583 (1966); Rathburn v. U. S., 355 U.S. 107, 110, 78 S.Ct. 161) and by Federal interpretations of the Federal Omnibus Bill as to whether or not Federal First and Fourth Amendment rights have been violated by electronic surveillance, in a purely local (State) felony prosecution; and particularly where defendant resists application of the constitutional principle?

STATEMENT OF THE CASE:

Petitioner Birge and two others (Dominick and Coats) were charged with destruction of police files evidencing crime committed by Birge's son.

Dominick confessed and agreed to engage Birge in a conversation (which would be a resume' of their crime) while wearing a concealed transmitter monitered by officers, which was done. The recording was placed in evidence at trial over

Birge's motion to suppress.

The Georgia Court of Appeals reversed on the ground that Georgia's "Invasions of Privacy" statute (Sec. 26-3001, et seq.) had been violated. The Georgia Supreme Court (two judges dissenting) reversed the Court of Appeals, holding that decisions of the Supreme Court of the United States (as followed in prior decisions of Georgia Appellate Courts) interpreting the Federal Omnibus Bill, enunciated the appropriate rule. This particular rule was that one does not "overhear" a conversation in which he participates, and for this reason he may surreptitiously agree in advance with others to record and transmit the private conversation (U. S. v. White, infra; Chaplin v. N.B.C., infra). Defendant insisted that no constitutional question was involved, and that the Court should evaluate the surveillance

under the provisions of the Georgia statute.

Birge's contention was that the Federal Omnibus Bill did not pre-empt the field of regulation of electronic surveillance; that the Bill left the States free to regulate electronic surveillance vis a vis purely local (State) crimes and citizen protection, and for this reason the matter should not be adjudicated under principles of constitutional law applicable to the Federal Omnibus Bill.

THE QUESTION IS SUBSTANTIAL

This Court has not, to our knowledge, passed upon the question of whether or not the Federal Omnibus Bill has so pre-empted the field that the States may not place greater restrictions upon electronic surveillance than does the Federal Bill, in purely local (State) matters.

Massachusetts [Commonwealth v. Vitello, 327 N.E.2d 819, at pp. 833-835(34)]; Michigan [People v. Warner, 237 N.W.2d 284, 287(1)]; Maryland [State v. Siegel, 292 A.2d 86, 95]; Kansas [State v. Fahra, 544 P.2d 341, 347-348]; Oklahoma [Pearson v. State, 556 P.2d 1025, 1034] and California [State v. Conklin, 522 P.2d 1049, 1051(3, 6), 1053, 1055(9) - appeal dismissed for want of substantial Federal question, 95 S.Ct. 652, 419 U.S. 1064] hold that the Omnibus Bill does not pre-empt the field. Circuit courts hold likewise. U. S. v. Capra, (C.A. N.Y. 1974) 501 F.2d 267, 276 - cert. den., 95 S.Ct. 1424, 420 U.S. 990. United States v. Marion (C.A. N.Y. 1976) 535 F.2d 697(2), 702. United States v. Armocida (C.A. Pa. 1975) 515 F.2d 49, 50(1), at pp. 51, 52.

In Georgia, the dissenting opinion in Cross v. State (1974) 128 Ga. App. 837 (198 S.E. 2d 338) was that "(t)he Federal authorities are not applicable here" (128 Ga. App., at p. 842).

The majority opinion in Cross (supra) was that

"The rationale for consent of a party is exactly the same as that stated in United States v. White, supra, and is also true under the Federal statute 18 USCA 2511(2)(c)". (128 Ga. App., at p. 840)

The Cross decision is that adopted by the Georgia Supreme Court as the rule in Georgia:

"Substantial reasons for our views have been stated in the majority opinion in Cross v. State, supra, and in Mitchell v. State, supra." (Second page of opinion in present case, Appendix)

In the Cross case (128 Ga. App., at pp. 838-839):

"One does not 'intercept' or 'overhear' a conversation that is made directly to him. ... This principle is well stated in a recent decision of the United States Supreme Court which has similar facts. United States v. White, 401 U.S. 745 (91 S.Ct. 1122, 28 L. Ed. 453): 'Hoffa v. U. S., 385 U.S. 293, which was left undisturbed by Katz, held that however strongly a defendant may trust an apparent colleague, his expectations in this respect are not protected by the fourth amendment...' Hoffa, at 302."

"Therefore, while the Federal statute is worded different', and while the Georgia statute is not under constitutional attack, the same reasoning supports the interpretation

of §26-3001; that it does not apply to one who is not a party to the conversation." (128 Ga. App., at p. 840 - emphasis added)

In Mitchell v. State, 239 Ga. 3, 235 S.E. 2d 509 (at 239 Ga., pp. 4-5):

"The reason for our holding is well set out in a Federal court opinion involving a defendant who telephoned a plaintiff and, by means of wire-tapping at defendant's end of the line recorded the conversation without plaintiff's knowledge or consent ..." [citing Chaplin v. N.B.C., 15 F.R.D. 134 (S.D. N.Y. 1953); Rathburn v. U. S., 355 U.S. 107, 110 (1957) and U. S. v. White, 401 U.S. 745 (1971).]

"The defendant ... had no right to rely on privacy of any of his conversations with his co-conspirators. They were under

no legal duty to him not to record or divulge what he said. See, Hoffa v. U. S., 385 U.S. 293 (1966); U. S. v. White, 401 U.S. 745 (1970) and Orkin v. State, 236 Ga. 176 (223 S.E. 2d 61) (1976)." State v. Birge, Appendix, conclusion of opinion)

The Orkin case also relies upon U. S. v. White, and further states that

"The Court (in White) went on to note that its opinion was shared by Congress as shown by the passage of the Omnibus Crime Control and Safe Streets Act of 1968 and the ABA Standards for Criminal Justice, Electronic Surveillance, §4.1..." (236 Ga., at p. 183)

ARGUMENT

"Title 28 USCA §2511(2)(c)(d) specifically provides that if ONE of the persons acts under color of law AND IS A PARTY TO THE CONVERSATION, it is not unlawful for him to intercept the communication. But the Georgia law, as found in Code Ann. §26-3006 (Ga. L. 1968 pp. 1249, 1333) provides that it is not unlawful to record the message when both parties to the conversation consent; or where the conversation is itself a crime or in furtherance of a crime. Thus, it is readily seen that the Federal law is much more liberal toward the Government than is the State law..." Cross, supra, 128 Ga. App., at p. 842, in dissenting opinion (emphasis in the opinion).

We do not ask this court to consider whether or not the Georgia Supreme Court

correctly interpreted a Georgia statute.

Our position is that the decisions of the Georgia Supreme Court (discussed in the above substantiality of the question) clearly demonstrate that they have subordinated the Georgia statute to the decisional praxis utilized by the Federal courts in their determination of the constitutionality of surveillances undertaken pursuant to the Federal Omnibus Bill.

The amicus brief of the Prosecuting Attorneys Council of Georgia, in the Georgia Supreme Court (at p. 13) insisted that

"We should not have a double standard in Georgia on 'one-party consent,' i.e., a Federal standard and a much more restrictive State standard ..." (emphasis added)

The short shrift given the Georgia statutes is exemplified in Cross, where, follow-

ing the application of White, Lopez, and the Omnibus Bill, the court says of Sec. 26-3006, Georgia Code:

"This section is also applicable, though redundant, in view of the above interpretation of Sec. 26-3001." (218 Ga. App. at p. 840)

The highest courts of Massachusetts and California, in the Vitello and Conklin cases (above) document the expressions of Congressional intent that the Federal Omnibus Bill leaves the States some leeway in controlling electronic surveillance.

REASON FOR GRANT OF CERTIORARI

State courts which have considered the question of whether the Federal Omnibus Bill pre-empts the field, although concluding the

negative, have expressed concern and doubt:

The Massachusetts court, in Vitello, said:

"It is clear that Congress, in enacting Title III, intended to occupy the field of wiretapping and electronic surveillance, except as that statute specifically permits concurrent State regulation." 327 N.E.2d, at p. 833.

The California court, in Conklin, said:

"We therefore proceed to determine whether it was the intent of Congress that the provisions of Title III regulating the interception of wire communications would pre-empt State law." (522 Pac.2d, at p. 1053) The discussion of this question consumes eight pages, with exhaustive notes and references.

The Kansas court, in Fahra, said:

"(A)lthough a State may adopt a statute with standards more stringent than the requirements of the Federal law (cits. omitted) a State may not adopt a statute with standards more permissive than those set forth in Title III." 544 Pac. 2d, at p. 348

The Maryland court, in Siegel, said that:

"Sec. 2515 (of the Federal Act) mandates that evidence obtained by the interception of wire or oral communications, in violation of the Crime Bill, cannot be received in evidence in any court, Federal or State ... A State Act which is more closely circumscribed than the Federal law in granting eavesdrop authority is certainly permissible." (292 Atl. 2d, at p. 94) (Emphasis added)

The Oklahoma court said, in Pearson, that:

"This Act by Congress is a comprehensive statute defining on a uniform basis the circumstances and conditions under which the interception of wire and oral communications may be authorized. Although we feel that the Act has not pre-empted the field of electronic surveillance, it has at the very least set minimal standards with which all States must comply." (556 Pac. 2d 1034)

The Michigan court, in People v. Warner (1974), said that:

"(S)omething must be said regarding the People's contention that the Federal eavesdropping statute has pre-empted the field, thus causing the State statute to be ineffective. We find this contention un-

tenable. The State statute is more stringent than the Federal statute ... The State statute does not produce a result inconsistent with the objective of the Federal statute." (237 N.W.2d, at p. 287)

Circuit Court opinions are not entirely consistent:

"Title III ... permit(s) States 'to adopt more restrictive legislation or no legislation at all, but not less restrictive legislation' (quoting from Senate Report No. 1097, April 29, 1968, U.S. Code Cong. and Adm. News, pp. 2112, 2187)." U. S. v. Capra (C.A. N.Y. 1974) 501 F.2d 267, 276.

United States v. Marion (C.A. N.Y. 1976) 535 F.2d 697, 702, said, in a Federal case, that:

"If a State should set forth procedures more exacting than those of the Federal

statute, the validity of the interceptions and the orders of authorization by which they were made would have to comply with that test as well."

but in U. S. v. Armocida (C.A. Pa. 1975) 515 F.2d 49, 52, the Court said that:

"So long as the information was lawfully obtained under Federal law and met Federal standards of reasonableness, it is admissible in Federal court despite a violation of State law."

If the Federal law does permit a State to adopt electronic surveillance laws more favorable to the citizen than are the Federal laws, a citizen of a State with such more-favorable laws is deprived of an important aspect of dual citizenship by judicial subordination of the State law to that of Federal law.

This Court may accept the State court's interpretation of the statute without accepting its characterization of the subject-matter of the decision. St. Louis Compress Co. v. State of Arkansas (1922) 43 S.Ct. 125, 260 U.S. 346, 67 L.Ed. 297; Crew Levich v. Pennsylvania (1917) 38 S.Ct. 126, 245 U.S. 292, 62 L.Ed. 295.

Here the State court applied Federal statutory and decisional criteria in evaluating the propriety of the surveillance, under the guise of interpreting the State statute. This is contrary to the Federal statute, which was not intended to control surveillances by State officers in State cases.

CONCLUSION:

The State court's use of the constitutional standards applicable to the Federal Omnibus Act was erroneous, in view of the expressed intent of Congress that the States not be so bound.

Respectfully,

COOK & PALMOUR

By: A. Cecil Palmour
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Address:

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Summerville GA 30747

CERTIFICATE OF SERVICE

I have served the State of Georgia with the foregoing petition by mailing a copy thereof to the following officers of the State of Georgia:

Mr. William F. Lee
District Attorney
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Hon. Arthur K. Bolton
Attorney General of Georgia
132 Judicial Building
Atlanta GA 30334

This April 11th, 1978.

Of Counsel for Petitioner

APPENDIX A

IN THE COURT OF APPEALS OF GEORGIA

JACK BIRGE, Appellant

vs.

STATE OF GEORGIA, Appellee

(unofficially reported: 142 Ga. App. 735)

53578. BIRGE v. THE STATE.

McMURRAY, Judge.

Birge, Dominick, and Coats were indicted for hindering apprehension and punishment of a criminal by

destroying the case file of the Carrollton Police Department dealing with charges of possession of marijuana by Birge's son. Dominick and Coats plead guilty. Birge was tried, convicted and sentenced to three years in prison. Birge appeals. *Held:*

1. On the hearing of Birge's jury challenge, the only evidence as to the composition of the jury panels was the opinion testimony of a statistician. The trial court, as trier of fact, was free to reject this expert testimony. *Hays v. State*, 16 Ga. App. 20 (5) (84 SE 497); *Ford Motor Co. v. Hanley*, 128 Ga. App. 311, 315 (2) (196 SE2d 454). This enumeration of error is without merit.

2. When the investigation of law enforcement agencies led them to Dominick, he confessed and implicated Birge. To determine the truth of allegations regarding Birge, Dominick agreed to have an electronic transmitting device concealed on his person. With the device in place Dominick participated in conversations with Coats, Birge, and Birge's secretary which law enforcement officers monitored from a distance and recorded. There was no court order authorizing electronic eavesdropping, and Birge contends that eavesdropping was therefore illegal.

Birge challenges the construction of Code Ann. § 26-3001 (Ga. L. 1968, pp. 1249, 1327, since amended, Ga. L. 1976, p. 1100) set forth in a two-judge opinion in *Cross v. State*, 128 Ga. App. 837 (198 SE2d 338). That opinion is not binding precedent (*Wakefield v. A. R. Winter Co.*, 121 Ga. App. 259, 264 (174 SE2d 178); *Supreme Oil Co. v. Brock*, 129 Ga. App. 863, 864 (1) (201 SE2d 659); Rule 26 (c) (Code Ann. § 24-3626)), and we would decline to follow that decision. See *State v. Guhl*, 140 Ga. App. 23, 27 (2) (230 SE2d 22). But in *Mitchell v. State*, 239 Ga. 3, the Supreme Court in reviewing *Guhl* (also *Mitchell*) held the Court of Appeals erred in "reinterpreting the statute."

In *Cross v. State*, supra, a police officer was told by his informer that a certain Johnson wanted to reach him. The officer contacted Johnson and arranged to meet him. Prior to the meeting an electronic transmitting device was concealed upon the person of the officer. During the meeting Johnson's offer to bribe the officer was received and recorded by other officers. The opinion which sets

forth the law of that case held that the prohibitions set forth in Code Ann. § 26-3001, supra, relate only to one who is not a party to the conversation itself and that those prohibitions were inapposite there. The special concurrence suggests that the language of the majority opinion was overly broad but the judgment correct because the facts were covered by Code § 26-3006 (Ga. L. 1968, pp. 1249, 1333).

Examination of the New Criminal Code, Invasions of Privacy, Ch. 26-30 (Ga. L. 1968, pp. 1249, 1327-1334) reveals the enactment of criminal provisions prohibiting certain invasions of privacy within this state. The various Code sections of this Chapter (Ch. 26-30) must be construed together in order to determine the intent of the legislature. *Seaboard C. L. R. Co. v. Blackmon*, 129 Ga. App. 342, 345 (199 SE2d 581). The construction of Code Ann. § 26-3001, supra, stated in *Cross v. State*, supra, openly reduces Code § 26-3006 to redundant surplusage. Yet both of these criminal provisions were enacted simultaneously, each as a portion of the comprehensive revision of our criminal law limiting invasions of privacy. Courts should not so interpret a statute as to make parts of it surplusage unless no other construction is reasonably possible. *Drake v. Drewry*, 109 Ga. 399, 401 (35 SE 44); *Boyles v. Steine*, 224 Ga. 392, 395 (162 SE2d 324).

We believe Code Ann. § 26-3001, supra, is a general prohibition of invasion of privacy which relates to all persons without regard to whether they are parties to the conversation itself. This construction gives meaning and effect to all provisions of Code Ch. 26-30. It is true that one does not "intercept" or "overhear" a conversation which is made directly to him, but one may "transmit" or "record" that message. In construing a statute, great weight must be given to the plain meaning of the words used in an effort to determine the intent of the legislature. *Garren v. Southland Corp.*, 235 Ga. 784, 785 (221 SE2d 571). Here, the clear language of Code Ann. § 26-3001, supra, is that "[i]t shall be unlawful for *any* person," (emphasis supplied) to commit the specified invasions of privacy. See also *Bauer International Corp. v. Cagles, Inc.*, 225 Ga. 684, 686 (1) (171 SE2d 314).

The decision in *Cross v. State*, supra, places

considerable reliance upon the similarity of its construction of Code Ann. § 26-3001, supra, and the minimum protection of privacy provided by the Fourth Amendment to the Constitution of the United States (Code Ann. § 1-804; USCA Const. Amend. 14) as construed in United States v. White, 401 U. S. 745 (91 SC 1122, 28 LE2d 453), and Lopez v. United States, 373 U. S. 427 (83 SC 1381, 10 LE2d 462). Reference to minimum constitutional protections is often a useful tool in the construction of statutes, but no presumption should arise that our legislature has not provided greater protection for our individual liberties than the minimum safeguards provided by the Constitution of the United States.

Unlike *Ansley v. State*, 124 Ga. App. 670, 674 (4) (185 SE2d 562), and *Humphrey v. State*, 231 Ga. 855, 862 (204 SE2d 603), the transmission and recording of the conversations in this case were not authorized by Code § 26-3006, an exception to Code Ann. § 26-3001, supra. The messages did not constitute the commission of a crime and were not, as the state contends, directly in the furtherance of a crime. It is uncontroverted that the police file had been destroyed and the crime completed prior to the arrest of Dominick. Any conspiracy to conceal the fact that a crime had been committed was also terminated by Dominick's confession and cooperation with the law enforcement personnel. See *Crowder v. State*, 237 Ga. 141, 153 (227 SE2d 230).

3. However, the Supreme Court in *Mitchell v. State*, 239 Ga. 3, supra, has adopted by per curiam decision the construction stated in *Cross v. State*, supra, in a minority opinion of three justices with three justices specially concurring and one justice concurring in the judgment only. As noted in the special concurrence three of the justices have rejected the decision in *Cross v. State*, supra, and approve of the opinion in *State v. Guhl*, supra, but they concurred in the judgment because appellant had a right to rely on the *Cross* case at the time of the incident as it was the only appellate court decision on this subject in Georgia, and the appellant should not be prosecuted since he had a right to rely on *Cross*.

Unlike *Mitchell v. State*, supra, this case does not deal with a citizen being prosecuted for a criminal offense

where he has presumably relied upon an appellate court decision. Therefore, we lack clear guidance upon this issue from the Supreme Court, it appearing that three justices would adopt *Cross v. State* (a Court of Appeals case), while three would reject *Cross*, and the seventh has expressed no opinion.

Examining the question in the absence of certain guidance from the Supreme Court we note that the rejection of the *Cross v. State* decision does not deny law enforcement agents the use of-electronic eavesdropping devices under appropriate circumstances and control. See Code Ann. § 26-3004 (Ga. L. 1972, p. 615; 1972, pp. 952, 953). We believe that the intent of the legislature is best revealed by the plain language of the statute as examined in this opinion, and we agree with the statement of Justice Ingram in his special concurrence that the General Assembly meant what it said in the statute. Inasmuch as the opinion of the Supreme Court, which certainly should control, is indefinite and uncertain, we must apply to that decision our interpretation which makes it compatible with the statutory law. We reverse the judgment of the lower court as the electronic eavesdropping evidence should have been suppressed.

Judgment reversed. Bell, C. J., and Smith, J., concur.

ARGUED FEBRUARY 28, 1977 — DECIDED JUNE 28, 1977 —
REHEARING DENIED JULY 7, 1977 CERT. APPLIED FOR.

Hindering punishment of criminals. Carroll Superior Court. Before Judge Knight.

Douglas C. Vassy, Al Horn, Jim Jenkins, Cook & Palmour, Bobby Lee Cook, A. Cecil Palmour, for appellant.

William F. Lee, Jr., District Attorney, for appellee.

APPENDIX B

IN THE SUPREME COURT OF GEORGIA

NUMBER 32740

STATE OF GEORGIA, Appellant

vs.

JACK BIRGE, Appellee

(Decided Jan. 3, 1978 - not yet reported)

We granted certiorari in this case to consider the opinion of the Court of Appeals in the case of Birge v. State, ___ Ga. App. ____ (Case No. 53578, Decided July 7, 1977), and the specific question of whether or not Code Ann. §26-3001 prohibits one party to a conversation from secretly recording or transmitting it without the knowledge or consent of the other party, where the conversation does not come under any exception set out in Code Ann. §26-3006 and no warrant is obtained under Code Ann. §26-3004.

We considered practically the same question in Mitchell v. State, 239 Ga. 3 (____ SE2d ____) (1977), with three Justices holding that a party is not prohibited under the code section, three disagreeing, and one concurring in the judgment only, without expressing his views in writing.

We again hold that Code Ann. §26-3001 does not prohibit one party to a conversation from secretly recording or transmitting it without the knowledge or consent of the other party. We conclude that the most reasonable interpretation of Code Ann. §26-3001, and the intention of the legislature in adopting this and the related code sections 26-3002 through 26-3010, is that it does not apply to one who is a party to the conversation. Cross v. State, 128 Ga. App. 837 (198 SE2d 338) (1974). Substantial reasons for our views have been stated in the majority opinions in Cross v. State, supra, and in Mitchell v. State, supra. The concurring opinion in Mitchell, taking the opposite view, studiously avoids the words "overhear" which is the first prohibitive word in the code section. Is it criminal in Georgia to overhear one's own conversation? How could you clandestinely overhear yourself?

To hold to the contrary would indeed curtail the free speech of each party to a private conversation. To reach such an illogical conclusion and interpretation could mean that one party to a telephone conversation could not intentionally record it (even by pencil) without advising the opposite party. For to do so in a clandestine manner would be a felony. Such could not be a correct pronouncement of the law. If one person is at liberty to repeat what another has said to him, and surely we all agree on this, unless privileged, how can one's freedom of speech be violated by mechanically assuring accuracy between private conversationalists?

The defendant here was obviously guilty of a serious crime. He had no right to rely on privacy of any of his conversations with his co-conspirators. They were under no legal duty to him not to record or divulge what he said. See, Hoffa v. U. S., 385 U. S. 293 (1966); U. S. v. White, 401 U. S. 745 (1970); and Orkin v. State, 236 Ga. 176 (223 SE2d 61) (1976).

Judgment is reversed. All the Justices concur, except Nichols, C.J. and Hill, J., who dissent.

HILL, Justice, dissenting.

Code § 26-3001 provides in subpart (a) that "It shall be unlawful for: (a) any person in a clandestine manner to intentionally overhear, transmit, or record, or attempt to overhear, transmit, or record the private conversation of another which shall originate in any private place.. .." The three types of conduct referred to are "overhear, transmit or record." The majority reason that because a party to a conversation cannot "overhear" it in a clandestine manner, it follows that Code § 26-3001, subparts (b) through (f), and Code §§ 26-3002 through 26-3010 do not apply to a person who is a party to the conversation. The majority let a single word, "overhear," control the construction of the entire chapter of the Code. Generally the intention of the legislature is to be gathered from the statute as a whole, rather than from a single word.

A person can intentionally "record" in a clandestine manner a private conversation to which that person is a party. This is particularly so as to a telephone conversation. The General Assembly's intent to prohibit the clandestine recording of a telephone conversation by a party to that conversation is confirmed as being correct by Code § 26-3006 which provides: "Nothing in section 26-3001 shall prohibit the . . . recording . . . of a message sent by telephone . . . when the sender and receiver thereof shall expressly or impliedly consent thereto or in those instances wherein the message shall be initiated or instigated by a person and the message shall constitute the commission of a crime or is directly in the furtherance of a crime, provided at least one party thereto shall consent." By their "one word controls everything" construction, the majority render meaningless the provisions of Code § 26-3006 insofar as the parties to the conversation are concerned.

APPENDIX C

32740

SUPREME COURT OF GEORGIA

ATLANTA, February 7, 1978

The Honorable Supreme Court met pursuant to adjournment.

By Bowles, J.

The following direction was given:

The State v. Jack Birge

Upon consideration of the motion for a stay of this court's remittitur in order that an appeal or an application for certiorari may be filed in the Supreme Court of the United States to obtain a review of this court's judgment rendered in this case on 1/18/78 such motion is hereby granted, subject to the following conditions:

(1) The clerk of this court is directed to withhold the transmittal of such remittitur to the trial court for ninety days from the date of this court's judgment.

(2) The clerk of this court is directed to transmit such remittitur to the trial court not later than the ninety-fifth day from the date of this court's judgment, provided that the clerk shall continue to withhold the transmittal of such remittitur if the clerk is notified in writing that an appeal or application for certiorari has been timely filed in the Supreme Court of the United States. Upon the timely filing of such appeal or application in the Supreme Court of the United States, the clerk is directed to withhold the transmittal of such remittitur until the final disposition of the case by that Court.

(Signed) Jesse G. Bowles
Justice

SUPREME COURT OF THE STATE OF GEORGIA,

CLERK'S OFFICE, ATLANTA, February 7, 1978

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Clerk